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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

July 2, 1997

By Hand

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: Consolidated Opposition of CellularVision USA, Inc.
to Petitions for Reconsideration
CC Docket No. 92-297

Dear Mr. Caton:

On behalf of CellularVision USA, Inc. ("CVUS"), and pursuant to Section 1.429(f) of the Commission's Rules, enclosed please find an original and eleven (11) copies of its "Consolidated Opposition to Petitions for Reconsideration" in the above-referenced proceeding.

Please direct any questions regarding this matter to the undersigned.

Sincerely,



Michael R. Gardner
William J. Gildea
Counsel for CVUS

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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JUL - 2 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Rulemaking to Amend Parts 1, 2, 21)	CC Docket No. 92-297
and 25 of the Commission's Rules to)	
Redesignate the 27.5-29.5 GHz)	
Frequency Band, to Reallocate the)	
29.5-30.0 GHz Frequency Band, to)	
Establish Rules and Policies for Local)	
Multipoint Distribution Service and for)	
Fixed Satellite Services)	

**CONSOLIDATED OPPOSITION OF CELLULARVISION USA, INC. TO PETITIONS
FOR RECONSIDERATION**

CellularVision USA, Inc.¹ ("CVUS") by its attorneys and pursuant to Section 1.429(f) of the Commission's Rules (47 C.F.R. §1.429(f)), hereby files its consolidated opposition to numerous Petitions for Reconsideration filed in the above-referenced rulemaking proceeding.² Specifically, CVUS opposes discrete portions of Petitions for Reconsideration filed by Cook Inlet Region, Inc. ("Cook Inlet"), Nevada Department of Transportation ("Nevada DOT"), Rural Telecommunications Group ("RTG"), and WebCel Communications, Inc. ("WebCel").³

¹ CellularVision USA, Inc. is publicly traded on the NASDAQ National Market under the symbol "CVUS."

² See *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, CC Docket No. 92-297, released March 13, 1997 ("LMDS Second Report & Order" or "LMDS Fifth NPRM").

³ *Cook Inlet Petition for Reconsideration*, CC Docket No. 92-297 (May 29, 1997); *State of Nevada Department of Transportation Letter to William F. Caton*, CC

1. Cook Inlet's Proposal That The Commission Should Eliminate Installment Payments for Small Businesses Is Contrary to Explicit Congressional Intent and Would Thwart Small Business Participation in LMDS Auctions

CVUS vehemently opposes Cook Inlet's inexplicable request to eliminate installment payments altogether for small businesses.⁴ Cook Inlet's ill-conceived proposal is contrary to Congressional intent and well-established Commission policy to promote small business opportunities. Cook Inlet's proposal also ignores the real-world financing needs of small businesses, and ultimately, if adopted, would discourage small business participation in LMDS auctions.

CVUS has argued throughout the protracted LMDS proceeding — culminating with its Petition for Reconsideration⁵ — that installment payments are essential to ensure meaningful small business participation in LMDS auctions. In this regard, CVUS has urged the Commission to adopt a second financing option that allows a qualifying small business to pay for its license (less the 25% bidding credit and 20% downpayment) under a *deferred incremental payment plan* beginning in year six of the license term, with accrued interest at the 10-year T-note rate commencing in year six and ramped-up principal repayment during years 7-10 of 5%/10%/10%/75%, respectively. CVUS' deferred payment plan, which has been thoroughly vetted with

Docket No. 92-297 (May 29, 1997); *Petition for Reconsideration of the Rural Telecommunications Group*, CC Docket No. 92-297 (May 29, 1997); *Petition of WebCel Communications, Inc. for Partial Reconsideration*, CC Docket No. 92-297 (May 29, 1997); See FCC Public Notice 74637, Report No. 2203, June 12, 1997; *Federal Register*, Vol. 62, No. 116, 32809 (June 17, 1997).

⁴ See *Cook Inlet Petition*, pp. 5-11.

⁵ See *CVUS Petition for Partial Reconsideration*, CC Docket No. 92-297 (filed May 29, 1997).

leading Wall Street investment houses, would provide a much needed, more realistic financing option to advance Congressional intent that small business entrepreneurs provide consumers choice and competition in new technologies licensed by the FCC, including LMDS.

As Cook Inlet surely knows, in order to ensure that FCC licenses are held by the widest variety of competing applicants, *including small businesses*,⁶ Congress directed the FCC to:

“Consider alternative payment schedules and methods of calculation, including lump sums *or guaranteed installment payments*, with or without royalty payments, *or other schedules or methods* that promote the objectives described in paragraph (3)(B).”⁷

Pursuant to this mandate, the Commission has utilized installment payments in numerous auctions and found that “small businesses have been successful in the auctions in which installment payment plans were offered . . . resulting in new opportunities for small businesses to offer spectrum based services.”⁸ In fact, in recent auctions for Narrowband and Broadband PCS, DBS, MMDS, 900 MHz SMR, and DARS licenses, roughly 79% of the bidders were “small businesses,” as defined by the particular auction rules, and small business entrepreneurs acquired 54% of the

⁶ 47 U.S.C. §309(j)(3)(B) (*emphasis added*).

⁷ 47 U.S.C. §309(j)(4)(A) (*emphasis added*).

⁸ See *In the Matter of Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, WT Docket No. 97-82, FCC 97-60, ¶ 34 (released February 28, 1997).

total licenses offered at these auctions.⁹

Despite Congress' recognition of the importance of installment payments and the Commission's successes to date in utilizing installment payments to attract small business participation in spectrum auctions, Cook Inlet argues that the Commission should end the installment payment program. Cook Inlet would have the Commission believe that the lesson to be learned from the financial problems that some PCS C-Block licensees are currently facing is to simply eliminate installment payments, which in fact are often the *only* means by which entrepreneurs can finance their licenses acquired at auction. CVUS disagrees with Cook Inlet's flawed assessment and suggests that the primary lesson to be learned from PCS C-Block is that the Commission must provide LMDS bidders with a more realistic financing option, as detailed in its *Petition*, to avoid similar repayment problems.

With regard to the FCC's responsibility to provide a more realistic installment payment plan, under its own rules the Commission is required to "tak[e] into consideration the characteristics and capital requirements of the particular service."¹⁰ In regard to the exciting, multi-faceted LMDS technology — technology that can simultaneously provide video, voice, high-speed data transfer and Internet services — there is little doubt that LMDS will be a capital-intensive service. In fact, in the *LMDS Third Notice of Proposed Rulemaking*, the Commission recognized that "the

⁹ See *In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Report*, GN Docket No. 96-113, FCC 97-164, ¶142 (released May 8, 1997).

¹⁰ 47 C.F.R. §1.2110(b)(1).

cost of acquiring a [LMDS] license is likely to be higher than for other services.”¹¹ Moreover, LMDS auction prices could rival those of PCS C-Block given the larger amount of spectrum allocated to LMDS, the greater number of permissible services available to LMDS providers, and the fact that LMDS auctions will not be restricted to “entrepreneurs,” i.e., entities with gross average annual revenues of less than \$125 million.

In addition, the Commission itself recognized in the *LMDS Third NPRM*, that “[LMDS] build-out costs are likely to be significant.”¹² Installment payments therefore are essential in the nationwide licensing of LMDS, as small business LMDS licensees will need to focus their limited start-up capital on building out their system rather than immediately servicing heavy, front-end government debt. It is particularly critical to minimize the cash burden of LMDS entrepreneurs in the early years of operation since their initial cash outlays for system deployment and build-out will necessarily be very substantial, as LMDS licensees must fund the purchase of transmitters, set top boxes, the system’s backbone as well as general operational start-up costs.

As a result, if adopted, Cook Inlet’s unsupported proposal that the Commission eliminate installment payments would substantially undermine small business participation in LMDS. In fact, it is difficult to conceive how any *small business*, as defined by the Commission, could build out its LMDS system after being required to pay 75% (after the Commission’s 25% *small business* discount) of the winning

¹¹ See *Third Notice of Proposed Rulemaking and Supplemental Tentative Decision*, 11 FCC Rcd 53, 122 ¶188 (1995) (“*LMDS Third NPRM*”).

¹² *Id.*

auction price in a lump sum prior to licensing as Cook Inlet proposes.¹³ Importantly, the Commission already has noted that “the primary impediment to participation by designated entities is lack of access to capital.”¹⁴ Thus, for many small businesses, an installment payment plan is often the *only* means by which the entrepreneur can finance its license acquired at auction.¹⁵

Moreover, even if a small business could secure private investment in order to be able to make such a large lump sum payment prior to the license grant, Cook Inlet ignores the likely reality that such a small business licensee would have little capital left to commence system construction, marketing and operations — to the detriment of U.S. consumers seeking the alternative choices LMDS is capable of offering in video, voice and data services. In sum, eliminating installment payments would thwart meaningful small business involvement and the resulting marketplace competition that small businesses would bring to the nationwide LMDS industry that will develop after LMDS auctions.

2. Nevada DOT’s Request to Have its 31 GHz Applications Reinstated and/or Operate Its Yet-to-be-Constructed Point-to-Point System Pursuant to an STA Should Be Rejected

Much like Sierra Digital’s illogical attempt to have the Commission undo the 31

¹³ Similarly, an LMDS *very small business* as proposed by Cook Inlet could not afford to pay 65% of the winning auction price in a lump sum.

¹⁴ *In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Fifth Report and Order*, 9 FCC Rcd 5532, 5537 ¶ 10 (1994).

¹⁵ Cook Inlet fails to explain how “responsible small bidders” can be assured of affordable private financing in lieu of government financing. *Cook Inlet Petition*, p. 9.

GHz band compromise band plan, Nevada DOT's request to have its dismissed applications reconsidered and granted on an STA basis amounts to a *de facto* allocation for prospective point-to-point use.¹⁶ In reaching its compromise band plan, the Commission thoroughly considered all of the compelling public interest factors. After its careful balancing of all attendant interests, the Commission granted all point-to-point incumbents throughout the 300 MHz the *absolute right* — where none previously existed — to receive interference protection from LMDS licensees.¹⁷ The Commission also appropriately concluded that *expansion* of the 31 GHz services “would likely have a chilling effect on the efforts of LMDS providers to establish and expand their services in response to consumer demand, seriously jeopardizing our objectives in designating the band for LMDS.”¹⁸

As CVUS previously noted in its opposition to the reinstatement of the properly dismissed 31 GHz point-to-point applications filed after the release of the *LMDS Fourth NPRM*,¹⁹ the Commission should not be lured into accepting Nevada DOT's seemingly innocuous proposal to operate under a temporary authorization on a secondary basis as granting this “one-time exception” is wrought with a myriad of potential problems. For example, if Nevada DOT is allowed to operate under these terms and if interference with an LMDS operator is ultimately established, LMDS

¹⁶ See *Nevada DOT Letter*.

¹⁷ *LMDS Second Report & Order*, ¶80. Incumbents in the middle 150 MHz will be afforded the opportunity to move to the outer 75 MHz bands to receive full interference protection. *Id.*, ¶91.

¹⁸ *Id.*, ¶98.

¹⁹ See *CVUS Opposition to Petition for Partial Reconsideration Filed By Sierra Digital Communications, Inc.*, CC Docket No. 92-297, June 4, 1997.

consumers in the affected area will be adversely impacted. Notwithstanding the injury to consumers and LMDS licensees, the Commission can expect to be involved in a time consuming and politically contentious effort to force the Nevada DOT to immediately cease operations, even though the state authority is only operating under an STA. Moreover, by granting Nevada DOT's request, other parties can be expected to petition the Commission for similar relief — creating a flawed and unsound public policy scheme wherein the Commission is abandoning sound spectrum management policies in favor of an *ad hoc* and unpredictable waiver approach to requests for access to spectrum.

Finally, as the Commission noted, the Nevada DOT admittedly indicated in the LMDS record that “traffic control systems are being developed for a *variety* of bands and the technology is improving or *changing rapidly*.”²⁰ And, as the Commission recognized, LMDS technology could be developed to suit some of these incumbent services. Accordingly, Nevada DOT's dual request to have its dismissed application reinstated and to be granted operational authority on an STA basis should be rejected.

3. RTG's Argument that the Commission's Construction Requirements Are Inadequate to Ensure Rural Service Is Misplaced

While CVUS shares RTG's goal that LMDS reach rural areas, it is neither necessary nor sound from a public policy perspective for the Commission to alter its current construction requirements for LMDS licensees.²¹ Ironically, the necessary “incentives” that RTG seeks to create in order to maximize LMDS coverage to rural

²⁰ *Second Report & Order*, ¶99 (*emphasis added*).

²¹ *See RTG Petition*, p. 12 (characterizing the Commission's substantial service construction requirements as “meaningless”).

consumers will be a likely by-product of the flexibility inherent in the Commission's proposed partitioning rules.²² Thus, if the Commission ultimately adopts flexible partitioning rules as detailed by the Commission and supported by CVUS, potential LMDS providers will have the ability to gain access to consumers in previously unserved rural areas within a BTA. As a result, with the expected adoption of flexible partitioning rules, the marketplace will dictate the value of "unserved" or "underserved" rural areas, allowing entrepreneurial companies to purchase geographic areas from LMDS licensees in order to provide service to these areas.

Moreover, requiring strict, geographic-based construction requirements as RTG suggests could have the untoward effect of discouraging development of the multiple, simultaneous niche markets that LMDS is capable of offering within a BTA.²³ Accordingly, the Commission should refrain from altering its appropriately flexible construction requirements for LMDS licensees. The Commission's adoption of flexible partitioning and disaggregation rules also will help to promote the most expeditious and efficient roll-out of LMDS to all regions of the country.

4. WebCel's Proposal for a *Very Small Business* Category Should Not Impact the Current Incentives for "Small Businesses" as Set Forth by the Commission

In its Petition for Reconsideration, WebCel requests that the Commission create a *very small business* designation for entities with average annual gross revenues of less than \$15 million.²⁴ While this proposal may have potential merit as additional

²² See *LMDS Fifth NPRM*.

²³ As the Commission recognized, LMDS licensees may offer "specialized or technologically sophisticated service that does not require a high level of coverage to be of benefit to customers." *LMDS Second Report and Order*, ¶ 270.

²⁴ See *WebCel Petition*, pp.10-11.

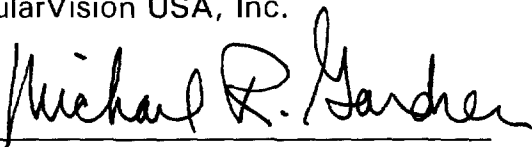
small businesses could participate in LMDS auctions, CVUS opposes implementation of the plan if it would reduce the Commission's current incentives for *small businesses* (revenues of \$40 million or less) or entities with revenues between \$40 and \$75 million. In order to create the inducement to attract the largest number of small business LMDS licensees, any incentives granted for *very small businesses* must be *in addition to* the current bidding credits and installment payment plans adopted for small businesses and entities between \$40 and \$75 million. Accordingly, the Commission should reject WebCel's proposal if it would scale back the Commission's reasoned incentives for *small businesses* and entities with revenues between \$40 and \$75 million.

Conclusion

For the reasons noted above, and based on the ample record in the LMDS Rulemaking that has already been carefully considered by the Commission, CVUS urges the Commission to reject those proposals discussed above that were set forth on reconsideration by Cook Inlet, Nevada DOT, RTG and WebCel.

Respectfully submitted,

CellularVision USA, Inc.

By: 

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July 2, 1997

Its Attorneys

Certificate of Service

I, Michael C. Gerdes, hereby certify that copies of the foregoing, "Consolidated Opposition of CellularVision USA, Inc. to Petitions for Reconsideration" were delivered by hand, on July 2, 1997, to the following:

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